No. 3591

United States
Circuit Court of Appeals
For the Ninth Circuit.

PHELPS DODGE CORPORATION, a Corporation,

Plaintiff in Error,

vs.

EPIFANIO GUERRERO,

Defendant in Error.

In Error to the District Court of the United States For the District of Arizona

Brief of Plaintiff in Error

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TABLE OF CONTENTS

Pages

Pages

Pages

Pages

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STATEMENT OF THE CASE

This is a writ of error bringing here for review a judgment entered in the District Court of the United States for the District of Arizona against the plaintiff in error. For convenience, we will refer to the parties by the designation used in the court below.

The plaintiff, a citizen of the Republic of Mexico, brought his action against the defendant, a New York corporation, under the Employers' Liability Law of Arizona, claiming damages for an injury suffered in the course of his employment in one of the hazardous occupations enumerated in the Law.

Defendant consented to the jurisdiction. The action was tried before Honorable William H. Sawtelle, District Judge, with a jury, at the May, 1920, term of Court, at Tucson, Arizona. The trial resulted in a verdict for plaintiff in the sum of Twenty-seven Hundred and Fifty Dollars.

Defendant's position is frankly that plaintiff is an impostor, a malingerer. (Transcript of Record, Page 52). If he is not, the judgment in this case is inadequate and the jury should have given him greater damages. If we are right, the verdict should have been for defendant. We do not mean to say that plaintiff now has normal vision; we do not know what his vision is. (Transcript of Record, Page 106). We know what it was when defendant's specialists examined his eye. Our contention is that when he was examined by defendant's four specialists immediately after the date he ascribes to his accident, his vision was not, and he did not claim it to be, what he stated it then was at the trial, i. e. total blindness of the left eye.

The Court held the testimony of these physicians privileged and defendant was prevented from putting this state of facts before the jury. Substantially, the record presents but one question. Was this action of the Court error?

To get the case at the outset fully and fairly before the Court and to clearly indicate how this question was presented below demands a statement of facts longer and more in detail than is customary. If it impinges on the rule as to brevity, it is a necessary and, we think, permissible infraction.

The amended complaint alleges that on the 20th day of January, 1919, while the plaintiff was employed as a mucker and miner in a mine of the defendant's at Morenci, Arizona,

> "As plaintiff was striking a boulder to break the same with a sledge-hammer, in the line of his duties as such employee, some particles of rock flew off from such boulder as plaintiff struck same with a sledge-hammer and the same flew into and violently struck in his eyes, and as the said particles of rock struck the plaintiff into his eyes, it produced in him weak, giddy and confused condition, and which said rock striking him in his eyes has ever since caused him much injury to both his eyes, and has practically caused him the loss of his left eye, and he has now as a result of said injury very faint vision in his left eye." (Transcript of Record, Pages 9-10).

Hereafter we will refer to the page of the transcript of record as follows: (Tr. p.———). Although the complaint alleges that plaintiff was struck in the eyes, his testimony was that he was struck in the left eye and as to an injury to that eye (Tr. p. 42).

The only evidence as to the facts of the accident was given by plaintiff. In response to questions propounded by his counsel he stated:

> "We were digging out ore and one of them big rocks fell down and I hit it with an eight-pound sledge-hammer and when I hit it, one of them pieces broke off and hit me in the eye." (Tr. p. 42).

Plaintiff attempted to account for the fact that there was no one else to testify as to the accident.

> "My partner was on one side, one square of the lumber, and I was on the other square of the lumber myself." (Tr. p. 43). "I don't know where this person is that was working with me. When they stopped the work where I was working, he stopped him from work and he went away. He was also deaf besides; the man that was working with me was deaf." (Tr. p. 43).

On cross-examination, plaintiff stated:

> "He was working right at that square, and I was on the other one, and he saw the rock when it hit me in the eye, and I says to him: 'I hurt my eye with that rock' and he looked at me and just shook his head." (Tr. p. 47).

Plaintiff continued:

> "From the time I got my eye hurt until I went out to lunch, I kept on working, and at that time when we went out I reported to the foreman, they call him Gene, but I think his name is Santiago. He is still foreman at Morenci. He is around the Arizona there somewhere. I don't know whether he is still at Morenci or not." (Tr. p. 48). "I went to see the doctor right away." (Tr. p. 48). "That was Dr. Rice, I think they call him." (Tr. p. 48).

On his direct examination, plaintiff stated that he was blind in his left eye. (Tr. p. 45). On cross examination, he emphatically reiterated this statement (Tr. p. 45), though it appeared that he wanted to give the

impression that Dr. Rice's treatment of his eye had in some way contributed to the injury; he says:

> "I used to go to the doctor about every other day. I went to him for eight days and then he put some kind of a water that was too strong in my eye, or something and from there they sent me to Phoenix." (Tr. p. 48-49).

Further:

> "He treated me for some days with some black medicine that he put in my eye and one of those days he went over there and he dipped a little piece of stick and a little cotton on the end of that stick, and he put it in a bottle, and when he come out with it, it smoked like, and when he put it in my eye, it burned like everything. It was pretty strong for my eye." (Tr. p. 48-49).

At the close of plaintiff's cross-examination he was asked if he were willing to submit himself to examination by a physician to be appointed by the Court. He replied:

> "I have been examined; what more examination do you want?" (Tr. p. 52).

On being asked a second time, he replied:

> "I have been suffering; no, sir; I have been suffering so long, what is the use of having that examination."

He was pressed for a categorical answer and finally answered in the negative. (Tr. p. 52).

The following question was then put to plaintiff's counsel:

MR. MATHEWS: (Defendant's counsel) "Your Honor, we now inquire of counsel for the plaintiff if they, as his attorneys, are willing to submit him to examination by impartial physicians to be appointed by this Court and test his eyesight, and report to the Court whether or not it is true he can't see." (Tr. p. 52).

This inquiry, elicited the following response from Mr. Dunseath, one of the plaintiff's counsel:

"If this man is not suffering from an injury, we want to know it." (Tr. p. 52).

The Court stated that an impartial physician would be selected but the trial would not be delayed for that purpose. Doctor B. F. Hardridge, an occulist, was selected by the Court, and at the close of the evidence made a statment as to the examination which he had made of plaintiff's eyes during a recess of the court. (Tr. p. 101).

The examination of the plaintiff was resumed. On re-cross-examination he stated:

"My left eye first became blind the same time as that injury. I have been blind in that eye ever since that rock struck me. Yes, I was injured in that eye when I first went to see Doctor Rice." (Tr. p. 53-54).

The question was then put to the plaintiff:

"Did you tell Doctor Rice that you could not see in that eye when you went to him?" (Tr. p. 54).

This was objected to as privileged. The objection was sustained and an exception saved (Tr. p. 55).

Defendant predicated its first assignment of error on this ruling (Tr. p. 131).

In its appropriate place, it will be urged that there was no question present here but the scope of the direct examination being such as to permit the question on cross examination; that the Arizona statute creating the privilege between physician and patient had no application because the Statute is obviously a bar only to disclosures by the physician, and is not intended to circumscribe the patient's utterances.

The second error assigned occurred during the direct examination of defendant's first witness, Doctor H. W. Rice, at the date in question, a physician on the defendant's medical staff at Morenci. (Tr. p. 57). Of the many doctors who examined the plaintiff's eye, Doctor Rice was the first. (Tr. p. 67). He had the plaintiff under his observation over a month immediately following the date of injury. (Tr. p. 68).

After the usual preliminary questions, Doctor Rice was asked:

> "When he first came to you on that afternoon in the latter part of January, 1919, complaining of the eye injury, when you first examined him, what did you find?" (Tr. p. 69).

The objection that the matter was privileged was interposed (Tr. p. 69) and sustained (Tr. p. 69). The defendant saved an exception (Tr. p. 71).

At another point we will present the argument that the matter excluded was not privileged because subdivision6, Paragraph 1677, Civil Code, R. S. of Ariz., 1913, establishing the privilege between physi-

cian and patient has no application to cases of traumatic injury, being in terms restricted to "physical or supposed physical disease."

While plaintiff was in the defendant's hospital during February, 1919, he was under the care of the head nurse, Miss Maude L. Messing (Tr. p. 71), defendant's second witness. Miss Messing found that the eye responded to treatment (Tr. p. 73). That it seemed to be no different than any other ordinary inflammation of the eye (Tr. p. 73), but that on two or three occasions, following a period of improvement, after the patient had been left alone at night, an unaccountable change for the worse developed (Tr. p. 73). That no matter when you went into the room, he always looked up at you and said he could not see (Tr. p. 74), several times a day and every day (Tr. p. 74).

During the months of January and February, 1919, plaintiff called a number of times at the general office of the defendant company and talked about his injury with the Company's manager, Joseph P. Hodgson (Tr. p. 75-78), defendant's third witness. He wore blue glasses but did not claim to be blind (Tr. p. 76). In fact, he said that he could see (Tr. p. 76). The plaintiff was told by the defendant's manager that he was willing to send him to any specialist or specialists for a careful examination so as to be absolutely sure that he had really received an injury to his eye (Tr. p. 76). If the examination of the specialists demonstrated such to be the case, he would settle with him (Tr. p. 76). The manager testified plaintiff understood that the examinations of

the specialists were for the purpose of seeking information for the defendant upon which to decide if a settlement should be made (Tr. p. 77). Plaintiff admitted that he requested a settlement (Tr. p. 74), and that he was sent to the specialists by the Company (Tr. p. 50). Also that the specialists examined his eye (Tr. p. 51, p. 85), but did not treat him (Tr. p. 44). The Company paid the doctors and the plaintiff's expenses on his trip to see them (Tr. p. 77).

However, when the plaintiff was recalled to the stand for the purpose of questioning him as to his understanding of the arrangement (Tr. p. 83), after an unavailing effort on the part of his own and defendant's counsel to get some light on the subject (Tr. p. 83), and an examination by the Court (Tr. p. 84) as to his conversations with defendant's manager, he fell back on the flat denial "He didn't tell me nothing." (Tr. p. 85).

Plaintiff admitted that he was examined by a specialist in Phoenix, Arizona, whose name he did not know (Tr. p. 49). That afterwards, he saw a doctor in El Paso who examined his eye (Tr. p. 50). Doctors J. B. Gray, D. W. Detweiler and H. H. Starke, all eye specialists practicing in El Paso, Texas, called to the stand by defendant, identified the plaintiff and testified that they had examined his eye, Doctors Gray and Detweiler in March, 1919, (Tr. p. 78, p. 96), Doctor Starke approximately a year before the trial (Tr. p. 99).

The first of these specialists to take the stand was Doctor J. B. Gray (Tr. p. 78). After the usual preliminary questions, he was asked:

"What sort of an examination did you put the plaintiff through?" (Tr. p. 79).

It was objected that the matter was privileged. The objection was sustained but the Court withdrew the rule and allowed defendant's counsel to be heard (Tr. p. 79).

The defendant argued the uncontroverted evidence was that plaintiff had consented to the examination of his eye by Doctor Gray for the purpose of informing defendant as to the condition of the eye; that the relation of physician and patient, under such circumstances, did not exist between Doctor Gray and the plaintiff, that there could be no confidential relation when the examination was for the express purpose of disclosures to defendant (Tr. p. 79-80).

At this juncture, the Court, of its own motion, called the plaintiff to the stand for the purpose of ascertaining his understanding of the basis upon which the examination by Doctor Gray was made. (Tr. p. 82). The plaintiff was examined by his own and defendant's counsel (Tr. p. 83-84) and by the Court (Tr. p. 84-85). At the conclusion of plaintiff's testimony the Court ruled, saying:

"Well, the evidence in that matter *being evenly balanced,* I feel that I ought to sustain the objection." (Tr. p. 85) (Italics ours).

This ruling precipitated further discussion. It was urged by defendant that a prima facie showing that the relation of physician and patient did not exist having been made, the evidence should be admitted and go to the jury with proper instructions, plaintiff's testimony clearly being rebuttal. The

Court adhered to its ruling that the matter was privileged (Tr. p. 87). Defendant saved an exception (Tr. p. 87).

The contention that this ruling was error will be fully developed at another point. A brief outline is appropriate here.

When one agrees to an examination by a physician solely for the purpose of informing another of his physical condition, no confidential relation arises between the physician and the person thus examined. The information secured is not privileged.

The Court invaded the province of the jury in weighing the evidence of the plaintiff and defendant's witness, J. P. Hodson, as to the purpose of Doctor Gray's examination of the plaintiff, and in passing on their credibility.

The Court reached an erroneous conclusion in holding that the relation of physician and patient existed between Doctor Gray and the plaintiff. If it be held that the question was proper for the Court as passing on the competency of a witness, such conclusion is reviewable here.

The burden of proving that the relation of physician and patient existed was on the plaintiff. The Court erred in excluding the testimony of Doctor Gray after holding the evidence to be evenly balanced on this question.

A like objection, that the matter sought to be elicited was privileged, was interposed to several further questions put by the defendant to Doctor Gray (Tr. p. 88-89). It will be observed that the point heretofore made, namely; Subdivision 6, Paragraph

1677, Civil Code, R. S. A. 1913, does not apply to communications or examinations as to traumatic injury, as well as the point, the relation of physician and patient did not exist between Doctor Gray and the plaintiff, are arguable under all of these exceptions. Each of these five questions asked of Doctor Gray (Tr. p. 88-89) were preliminary, and it was error to hold them within the privilege. In arguing these assignments, it will be seen that the unusual state of the evidence and the obvious value of the answers solicited render the error prejudicial.

Before Doctor Gray's examination was concluded, a number of hypothetical questions were asked by defendant (Tr. p. 90-91), the responses indicating that it would have been impossible for a person to receive a violent blow in the eye from a large rock without the skin showing some marks of the blow or the eye being blackened (Tr. p. 90), and if blindness were caused by such a blow without it immediately resulting (Tr. p. 91). Doctor Gray then delineated at length the technique and tests used to determine whether one claiming an eye injury is faking (Tr. p. 92-93-94).

Doctor D. W. Detweiler, an eye specialist residing at El Paso, Texas, who was called in by Doctor Gray to aid in the examination of the plaintiff's eye in March, 1919 (Tr. p. 97), next took the stand. Upon the suggestion of defendant's counsel, to avoid going through all questions and objections separately, it was stipulated that the record show that the same questions might be considered as having been put to Doctor Detweiler which were put to Doctor Gray,

with the same rulings and exceptions (Tr. p. 97). Doctor Detweiler further stated that he had heard the hypothetical questions put to Doctor Gray as well as Doctor Gray's testimony on the subject of tests applied to determine whether or not one claiming to be blind is in fact blind (Tr. p. 98), and that he agreed with Doctor Gray's conclusions (Tr. p. 98).

Doctor H. H. Starke, another eye specialist, practicing at El Paso, Texas, defendant's last witness, identified the plaintiff (Tr. p. 99), and testified that he had made an examination of the plaintiff's eye approximately a year ago (Tr. p. 99), when the plaintiff came to his office for that purpose.

The witness was asked:

> "What did you find as a result of that examination?" (Tr. p. 100).

Plaintiff objected on the ground of privilege. The objection was sustained, and an exception allowed.

What has already been set forth in this statement of the case might be open to misconstruction without some reference to the testimony of the specialist appointed by the Court, Doctor B. F. Hardridge, of Phoenix, Arizona, and that of Doctor Charles P. Dulin, of Tucson, who was plaintiff's witness, and who made an examination of plaintiff's left eye four days before the trial, at his office in Tucson. Doctor Hardridge's examination was made during a recess of the Court and his testimony given at the conclusion of the evidence. Both Doctor Hardridge and Doctor Dulin testified that plaintiff had some vision in his left eye (Tr. p. 61. p. 101, p. 109, p. 111). Doctor Dulin, plaintiff's witness, did not attempt to standardize the vision because he was not requested

to by plaintiff or plaintiff's counsel (Tr. p. 61), though he was thoroughly familiar with the tests customarily used for that purpose (Tr. p. 62) and resorted to to determine whether the subject is telling the truth (Tr. p. 63). After describing in detail the present condition of plaintiff's eye (Tr. p. 57), he was asked by plaintiff's counsel if the condition could have been caused by a blow (Tr. p. 57). He stated that it might (Tr. p. 57).

Doctor Hardridge, the Court's physician, found that plaintiff was able to see with both eyes (Tr. p. 102), but experienced great difficulty when he tried to measure the vision bcause of plaintiff's absolute refusal to answer questions; because of plaintiff's claim that he was not able to perceive light (Tr. p. 103); because of plaintiff intentionally or unintentionally holding his eyes so that the Doctor could not see them (Tr. p. 110-111). Doctor Hardridge was certain of vision in both eyes, (Tr. p. 105), but could not standardize the left eye because plaintiff refused to cooperate (Tr. p. 105). The only abnormal condition he found in plaintiff's left eye was an internal squint (Tr. p. 107), which in most cases is a congenital condition (Tr. p. 107). He found no condition indicating traumatic injury (Tr. p. 106). It was possible the condition of the eye might have resulted from a blow, but hardly probable (Tr. p. 106).

It is important to keep in mind that Doctor Hardridge examined the plaintiff at the trial (May 14, 1920), and Doctor Dulin a few days before the trial. The record shows that the examinations of Doctors Rice, Gray and Detweiler were made in February

and March, 1919, more than a year before the trial (Tr. p. 68, p. 78, p 97); that Doctor Martin's examination was made at a date earlier than the Gray and Detweiler examinations (Tr. p. 76); that Doctor Starke examined the plaintiff's eyes approximately a year before the trial (Tr. p. 99). Doctor Martin was not present in court although defendant requested his presence. His absence was due to illness (Tr. p. 78).

In commenting upon the difficulty encountered by a specialist in examining a subject who had undergone many previous examinations, Doctor Hardridge testified:

> "This man has been examined doubtless a great many times, is more or less familiar with the technique, rendering it very difficult for one to determine accurately. For example, in testing him with the confusion tests of the red and the green, he admitted once only, but I could not get him to repeat seeing red with the red lens in front of the left eye and the green lens in front of the right eye. The reason that I had difficulty in doing this and with other subsequent tests, was his absolute refusal to make answers to my questions. The Jackson Fogging Test, which is the placing of a high focus glass in front of the good eye with a weak lens in front of the left eye, but he refusd to answer, claiming he could not see anything, not even light." (Tr. p. 103),

And also:

"As I explained, the first man that sees such a case as that, he is in a position to get good information and a patient acquires a knowledge of technique very readily. This man has been seen perhaps many times, which made it very difficult to determine." (Tr. p. 108).

SPECIFICATION OF ERRORS

I.

The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to plaintiff on his cross-examination: "Did you tell Doctor Rice that you could not see in that eye when you went to him?" was priviledged under sub-div. 6 of par. 1677, Civil Code, Revised Statutes of Arizona, 1913, which provides that physicians may not testify without the consent of the patient. (Tr. p. 131).

II.

The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to defendant's witness, Dr. H. W. Rice: "When he first came to you on that afternoon in the latter part of January, 1919, complaining of the eye injury, when you first examined him, what did you find?" was privileged under sub-div. 6 of par. 1677, Civil Code, Revised Statutes of Arizona, 1913 (Tr. p. 133).

III.

The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to defendant's witness, Dr. J. B. Gray: "What sort of an examination did you put the plaintiff through?" was privileged under sub-div. 6 of par. 1677, Civil Code, Revised Statutes of Arizona, 1913 (Tr. p. 136).

IV.

The Court erred in holding the question as to whether the relation of physician and patient existed between the defendant's witness, Dr. J. B. Gray, and the plaintiff to be a question of admissibility or competency and not of weight or credibility. (Tr. p. 145).

V.

The Court erred in holding the evidence to be evenly balanced on the qustion as to whether the relation of physician and patient existed between the defendant's witness, Dr. J. B. Gray, and the plaintiff. (Tr. p. 143).

VI.

The Court erred in excluding evidence offered by defendant after defendant had made a prima facie showing that the relation of physician and patient did not exist between the defendant's witness, Dr. J. B. Gray, and the plaintiff. (Tr. p. 145).

VII

The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to defendant's witness, Dr. J. B. Gray: "What part of the examination did you conduct, and what part did Doctor Detweiller conduct?" was privileged under sub-div. 6 of par. 1677, Civil Code, Revised Statutes of Arizona, 1913. (Tr. p. 147).

VIII.

The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to defendant's witness, Dr. J. B. Gray: "Did you and Doctor Detweiler, or either of you, on this occasion make a test of the plaintiff to ascertain whether or not he really was blind in his left eye" was privileged under sub-div. 6 of par. 1677, Civil Code, Revised Statutes of Arizona, 1913. (Tr. p. 148).

IX.

The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to defendant's witness, Dr. J. B. Gray: "Did you and Dr. Detweiler or either of you on that occasion apply the scientific tests for the purpose of ascertaining whether or not the plaintiff's left eye was normal or abnormal?" was privileged under sub-div. 6 of par. 1677, Civil Code, Revised Statutes of Arizona, 1913. (Tr. p. 148).

X.

The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to defendant's witness, Dr. J. B. Gray: "And on the same occasion did you also make an examination of the plaintiff's right eye?" was privileged under sub-div. 6 of par. 1677, Civil Code, Revised Statutes of Arizona, 1913. (Tr. p. 148).

XI.

The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to defendant's witness, Dr. J. B. Gray: "As a result of that whole examination made by yourself and Doctor Detweiler, did you reach a conclusion as to the condition of the plaintiff's eyes?" was privileged under sub-div. 6 of par. 1677, Civil Code, Revised Statutes of Arizona, 1913. (Tr. p. 148).

ARGUMENT

I.

Specification of Error No. 1 is as follows:

> **"The Court erred in excluding evidence offered by defendant in ruling that the matter sought to be elicited by defendant's question put to plaintiff on his cross-examination: 'Did you tell Doctor Rice that you could not see in that eye when you went to him?' was privileged under sub-div 6, par. 1677, Civil Code, Revised Statutes of Arizona, 1913, which provides that physicians may not testify without the consent of the patient."**

The paragraph of the Arizona Civil Code referred to reads:

The following persons cannot be witnesses in a civil action:

> "*** (6) A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided, that if a person offer himself as a witness and voluntarily testified with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

The law says the physician may not be examined without the consent of the patient. The intent is to protect the plaintiff from a disclosure by the phy-

sician of confidential matters. This court has so held.

Arizona & N. M. Ry. Co., vs. Clark, 207 Fed. 817.

To say that the statute means that the patient cannot be cross-examined without his own consent reduces it to an absurdity, yet this is what the ruling in question amounts to. We do not argue that a patient could be compelled against his will to testify to confidential communications upon which his physician could not be examined. This might be doing by indirection what the statute directly prohibits.

That is not the situation presented. We simply claim that the plaintiff cannot put in his version of what transpired, half of the conversation so to speak, and then when we ask him a question plainly within the proper limits of cross-examination, have him seek refuge in the statute, virtually saying: All that, for reasons of my own, I don't care to testify to, is privileged.

The Court was in no doubt as to whether the question was proper cross-examination. The following language is from its discussion in ruling:

> "It would seem that if the plaintiff calls for a part of what took place, that the defendant might be entitled to know all that took place." (Tr. p. 55).

On direct examination plaintiff was asked:

> "And do you have any vision now in your left eye?"

He answered:

> "No." (Tr. p. 45).

He testified further, on direct:

> "I could see out of my left eye before the twentieth of January of last year. (Tr. p. 46). I can't see out of the left eye." (Tr. p. 51). "I went to the doctor to treat me on the twentieth of January, 1919. The doctor treated me at that time. This was in Morenci. I used to go to the doctor about every other day. I went to him for eight days and then he put some kind of a water that was too strong in my eye, or something, and from there they sent me to Phoenix." (Tr. p. 43). "That was Dr. Rice, I think they call him." (Tr. p. 48).

On cross examination he stated:

> "My left eye first became blind the same time as that injury. I have been blind in that eye ever since that rock struck me. Yes, I was injured in that eye when I first went to Doctor Rice." (Tr. p. 53-54).

It was at this point that the question objected to was asked:

> "Did you tell Doctor Rice that you could not see in that eye when you went to him?"

It does not seem that argument is required to demonstrate that the question was within the proper bounds of cross examination.

In *Strafford, et ux vs. Northern Pac. Ry. Co.,* 95 Wash. 450, 164 Pac. 71, it was held that a conversation between the physician and plaintiff's attorney was properly admitted on redirect examination where a part had been called for on cross examination.

Even if the question were not proper cross examination, in the absence of an objection on that specific ground by plaintiff's counsel or the court, we were entitled to an answer.

The ground of objection must be specifically stated.

Quaker Oats Company vs. Grice, 195 Fed. 441;

Fisher vs. Neil, 6 Fed. 89.

On appeal it must be deemed that there was no ground of objection other than that stated, other grounds are waived.

Evanston vs. Gunn, 99, U. S. 660, 25 L.Ed.306.

That the error was prejudicial is manifest. It would be difficult to frame a question going more to the very foundation of defendant's case. As witnessed by defendant's request for an examination by a physician appointed by the court to determine whether plaintiff was injured in his eye or not (Tr. p. 52), occurring a moment before in the trial, defendant's whole case was that plaintiff's claim of injury, and in fact the injury itself was not such as he stated it to be in his testimony, when he was examined on the twentieth of January, 1919, by Doctor Rice.

The refusal to allow cross examination of a witness upon matters brought out on direct examination, and relevant to the issue, is a denial of an absolute right, and ground for reversal.

Eames vs Kaiser, 142 U. S. 488, 34 L. Ed. 1901;

Prout vs. Bernards Land & Sand Company, 77 N. J. Law 719, 73 Atl. 486;

Lynch vs. Free, 64 Minn. 277, 66 N. W. 973;

Reeves vs. Dennett, 141 Mass. 207, 6 N. E. 378;

Patrick vs. Crow, 15 Colo. 543, 25 Pac. 985;
United States vs. Knowlton, 3 Dak. 58, 13 N. W. 573;
Graham vs. Larimer, 83 Cal. 173, 23 Pac. 286;
Lamprey vs. Munch, 21 Minn. 379;
Martin vs. Elden, 32 Ohio State, 282.

II.

Specification of Error No. 2 is as follows:

> **"The Court erred in excluding evidence offered by the defendant in ruling that the matter sought to be elicited by defendant's question put to the defendant's witness, Doctor H. W. Rice: 'When he first came to you on that afternoon in the latter part of January, 1919, complaining of the eye injury, when you first examined him, what did you find?' was privileged under sud-div. 6, par 1677, Civil Code, Revised Statutes of Arizona, 1913."**

It will be argued here that the defendant's question was not subject to the objection of privilege because the Arizona Statute applies only to "any physical or supposed physical disease." There is no claim in this case that the injury is the result of disease. Plaintiff claims that a blow from a rock destroyed the sight of his left eye. Consequently, when the court applied the statute creating the privilege to an injury of a traumatic nature, it included matters not within the purview of the statute.

There is a fundamental difference between disease and accidental injury. Webster defines disease as:

"An alteration in the state of the body, or of some of its organs, interrupting or disturbing the performance of the vital functions, or a particular instance or case of this; any departure from the state of health presenting marked symptoms; also, a special kind of alteration; a particular ailment or malady having special symptoms."

An accidental injury is one arising from:

"An undesigned contingency; a happening without intentional causation; that which exists or occurs abnormally; something unusual or phenomenal; an uncommon occurrence."

Patterson vs. Missouri Pac. Ry Co., 77 Kan. 236, 94 Pac. 138.

In distinguishing between injuries arising from disease and injuries arising from accident Mr. Labatt in the second edition of his work on Master and Servant, at page 5417 of volume 5, says:

"On the other hand, it is considered that an injury was caused by an 'accident' whenever it was the result of some fortuitous and external event, although the consequences of the injury may be aggravated by plaintiff's physical condition."

An inflammation of the eye caused by a splashing of water into the eye resulting in the loss of the eye is an accidental injury.

Sullivan vs. Modern Brotherhood of America, 167 Mich. 524, 133 N. W. 486.

For convenience we set out the Subdivision of paragraph 1677, Arizona Civil Code, on the subject of the privilege between physician and patient.

> (6) "A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided, that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

The law says a physician cannot be examined as to any communication with reference to any physical or supposed physical disease. If the sentence stopped there, no argument would be necessary. The statute would be expressly limited to communications with reference to disease. But the same clause continues: "or any knowledge obtained by personal examination of such patient." It is all one clause, there is no punctuation between the two. The only question is, does the law expressly open up the subject so as to include within the privilege physical examinations of every sort and with respect to all classes of patients.

This Court, in the Clark case, *supra,* had the same Statute under consideration. While the particular question we raise does not appear to have passed on in the opinion of this Court, 207 Fed. 817, we think that it is settled by the opinion of the Supreme Court of the United States, 235 U. S. 669, 59 L. Ed. 415. It

was there argued that the privilege had been waived by the plaintiff in taking the stand and voluntarily testifying to his physical examination, and that this should have permitted the physician to testify as to the knowledge obtained from such physical examination. The Court said, speaking through Mr. Justice Pitney, on Page 676 of the U. S. Reports, and on page 419 L. Ed.:

> "Without the consent of the patient, the physician's testimony is excluded with respect to two subjects: (a), any communication made by the patient with reference to any physical or supposed physical disease, and (b), any knowledge obtained by personal examination of such patient. And this privilege is waived, according to the terms of the proviso, only in the event that the patient offers himself as a witness and voluntarily testifies 'with reference to such communications.' We would have to ignore the plain meaning of the words in order to hold, as we are asked to do, that the testimony of other witnesses offered by the patient, or the testimony of the patient himself with reference to other matters than communications to the physician, or any averments contained in the pleadings, but not in the testimony, amount to a waiver of the privilege."

Thus the Supreme Court held that the testimony of the patient as to his physical condition is not a waiver under the statute, but in order for a waiver to occur, the testimony of the patient must be as to the communications made by him to the physician.

But the only communications mentioned in the statute are communications as to "any physical or supposed physical disease."

The language of the Supreme Court means that the latter part of this first sentence, namely "or any knowledge obtained by personal examination of such patient" must be read and construed in connection with the first part of this same sentence i. e. "as to any communications made by his patient *with reference to any physical or supposed physical disease.*" In short the latter expression merely serves to extend the first to physical examinations and does not introduce a new and unrelated subject matter i. e. personal examinations of every character and all sorts of patients. Note that the phrasing is "*any* knowledge obtained by personal examination," not knowledge obtained by *any* personal examination; and in the same connection that the statute speaks of "*any* communication" with reference to "*any* physical or supposed physical disease."

The question naturally comes to mind to whom do the words "such patient" in the expression "by personal examination of such patient" refer. Assuredly to "his patient" making communications "with reference to any physical or supposed physical disease." The words "his patient" occur at one other point i. e. in the expression "without the consent of his patient." But this is clearly parenthetical and likewise a reference to the same controlling language.

The use of a substituted phrase will frequently bring out more clearly the true meaning of ambi-

guous language. For instance, suppose the statute had stated that the physician could not be examined as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination *with reference to such disease,* instead of saying, as it does, "by personal examination *of such patient.*" Would there have been a material difference? "Such" is an adjective relating to some previous designation in the context. In the substituted language it refers to the disease as to which the communications are made by the patient. In the statute as it is it refers to the patient making the communications as to the disease: obviously the same thing.

Assume, for the purpose of argument, that the statute means that the physician cannot be examined with reference to any personal examination of the patient whatsoever; that the law applies to accidental injuries as well as disease, and observe into what a quagmire such a construction leads.

In the ordinary personal injury action, like the present case, where the question of disease is not involved the physician could then testify at will as to the communications made by the patient because the law establishes a privilege only with reference to communications as to disease; but the physician could not testify as to any knowledge obtained by a personal examination.

Apply the reasoning of the Supreme Court in the Clark case and we find that the patient could only be held to have waived the privilege by testifying as to communications. Could a trial court then say the

privilege cannot be waived in a case not involving disease because the Clark case holds that only testimony by the plaintiff as to communications amounts to a waiver, and the statute applies only to communications as to disease? The patient may testify without limit as to his physical condition or communications. There is no way he can waive the privilege. Without further analysis we will pass to the question of legislative intent.

The language of a statute controls in the absence of a clear legislative intent indicating that on the reason and policy of such legislation a broader construction should be resorted to.

Wellman vs. Bethea, 243 Fed. 222;

Sweet vs. United States, 228 Fed. 421;

Farmers' Loan and Trust Co., vs. Oregon & C. Railway Co., 24 Fed. 407.

To ascertain the intention of the legislature in the enactment of the statute, the Court may look to each part of the statute, to the evils and mischief to be remedied, and to the natural or absurd consequences of any particular interpretation.

Stockyards Loan Co. vs. Nichols, 243 Fed. 511;

Toledo Traction Light & Power Co. vs. Smith, 205 Fed. 643.

The privilege between physician and patient is a creation of the statute; it was unknown at common law.

> "The statute is in derogation of the common law, and often excludes the best evidence. It should not, therefore, be extended to matters of

evidence not coming clearly within its provisions, as the object and purpose of all trials is the development of the true facts in each case."

Missouri Pacific Railway Co. vs. Castle, 170 Fed. 841.

On principle, the confidential relation of physician and patient applies only to disease. Professor Wigmore's commentary is often quoted:

"(3) That the relation of physician and patient should be fostered, no one will deny. But (4) that the injury to that relation is greater than the injury to justice—the final canon to be satisfied — must most emphatically be denied. The injury is decidedly in the contrary direction. Indeed, the facts of litigation to day are such that the answer can hardly be seriously doubted. Of the kinds of ailments that are commonly claimed as the subject of the privilege, there is seldom an instance where it is not ludicrous to suggest that the party cared at the time to preserve the knowledge of it from any person but the physician. From asthma to broken ribs, from ague to tetanus, the facts of the disease are not only disclosable without shame, but are in fact often publicly known and knowable by every one—except the appointed investigators of truth. The extreme of farcicality is often reached in litigation over personal injuries,—in the common case, a person injured by a street car amid a throng of sympathizing onlookers. Here the element of absurdity will sometimes be double; in the first place, there

is nothing in the world, by the nature of the injury, for the physician to disclose, which any person would ordinarily care to keep private from his neighbors; and, in the second place, the fact which would be most strenuously secreted and effectively protected, when the defendant called the plaintiff's physician and sought its disclosure, would be the fact that the plaintiff was not injured at all! Upon such a foundation of vain imaginations is the privilege reared. The injury to justice by the repression of the facts of corporal injury and disease is a hundred fold greater than any injury which might be done by disclosure.*** Certain it is that the practical employment of the privilege has come to mean little but the suppression of useful truth,—truth which ought to have been disclosed and would never have been suppressed for the sake of any inherent repugnancy in the medical facts involved. Nine-tenths of the litigation in which the privilege is invoked consists of actions on policies of life insurance, where the deceased's misrepresentations of his health are involved; actions for corporal injuries, where the extent of the plaintiff's injury is at issue; and testamentary actions, where the testator's mental capacity is disputed. In all these the medical testimony is absolutely needed for the purpose of learning the truth. In none of them is there any reason for the party to conceal the facts, except to perpetrate a wrong upon the opponent. In the first two of these, the advancement of

fradulent claims is notoriously common; nor do the culpable methods of some insurance or railway companies, whatever they have been or still are, justify the infliction or retaliatory punishment, indirectly and indiscriminately, by means of an unsound rule for the suppression of truth. In none of these cases need there be any fear that the absence of the privilege will subjectively hinder people from consulting physicians freely; the actually injured person would still seek medical aid, the honest insured would still submit to medical examination, and the testator would still summon physicians to his cure." *Wigmore on Evidence,* Vol. IV., pages 3351-2.

In *Edington vs. Aetna Life Insurance Company,* 77 N. Y. 564, (32 Sickles), it was said:

"The policy of the statute is to enable a patient, without danger of exposure, to disclose to his physician all information necessary for his treatment. Its purpose is to invite confidence and to prevent a breach thereof. Suppose a patient has a fever, or a fractured leg or skull, or is a raving maniac, and these ailments are obvious to all about him, may not the physician who is called to attend him testify to these matters? In doing so, there would be no breach of confidence, and the policy of the statute would not be invaded. These and other cases which might be supposed, while perhaps within the letter of the statute, would not be within the reason thereof. *Cessante ratione legis, cessat et ipsa lex.*"

The letter of the law and the spirit of the law argue to the same end: the statute should be held to apply only to physical or supposed physical diseases.

III.

Where the patient consents to an examination by a physician for the purpose of informing a third party of his injury, the relation of physician and patient is not established and the privilege does not apply.

It is error for the court to determine the facts as to whether the relation exists when it becomes necessary to weigh the evidence and pass on the credibility of witnesses. In such cases, the evidence should be admitted and go to the jury with proper instructions.

Where the court has passed on such facts, the evidence will be reviewed on appeal.

The burden of proving the confidential relation is on the party asserting the privilege, and it is error to exclude the physician's testimony when the evidence as to the confidential relation is evenly balanced.

The questions raised by specifications of error III, IV, V and VI are briefly set out in the above statement. The argument may be best pursued under this one head.

In the Clark case, *supra,* this court had before it the first proposition presented here, namely: that information secured for the benefit of a third person through a physical examination is not privileged under the Arizona Statute. In that case, the testi-

mony of the physician was excluded because it was not made clear to the patient that he was acting only as the agent of the defendant company and not also as the patient's own physician. Had the plaintiff in the Clark case clearly understood that the examination was made solely to inform the defendant company of the condition of his eye, and that fact been clear in the record, it is apparent, from the language of the opinion (207 Fed. 823), this court would have arrived at the opposite conclusion. The decision of the point turns on plaintiff's understanding of the purpose of the examination. Inferentially, then, that decision is authority here, thus holding that where the plaintiff is explicitly informed that the examination is for the purpose of advising the defendant company as to the injury, and he so understands it and consents, the privilege is not applicable, and the physician's testimony should be admitted in evidence.

This appeal presents just such a case. Later, in reviewing the evidence on which the trial court found the relation of physician and patient to exist, we will fully develop this point. For the present, in consideration of the unmistakable position of this court in the Clark case, it will suffice to refer to the following authorities holding that it is error to exclude the physician's testimony when the examination was for the purpose of informing a third party, and the patient so understood its purpose. We invite the attention of the court to the facts in the cases cited, and submit, in none of them was the purpose of the

examination and the patient's understanding of it clearer than on the facts of the record herein.

Chicago I. & L. Ry. Co. vs. Gorman, 47 Ind. App. 432, 94 N. E. 730;

Strafford vs. Northern Pac. Ry. Co., 95 Wash. 450, 164 Pac. 71;

McGinty vs. Brotherhood of Railway Trainmen, 166 Wis. 83, 164 N. W. 249;

People vs. Austin, 199 N. Y. 446, 93 N. E. 57;

Lynch vs. Germania Life Ins. Co., 132 App. Div. (N. Y.) 571, 116 N. Y. Supp. 988;

Heath vs. Broadway & S. A. R. Co., 29 N. Y. 267, 8 N. Y. Supp. 863.

See also discussion of subject in:

Battis vs. Chicago R. I. & P. Ry. Co., 124 Iowa 623, 100 N. W. 547;

Cherpeski vs. Great Northern Ry. Co., 128 Minn. 360, 150 N. W. 1091;

10 Encyclopedia of Evidence, Page 112;

Elliott on Evidence, Art. 634.

To pass to the next question:—It was error for the court to determine the issue as to whether the relation of physician and patient existed, involving as it did a weighing of the evidence and passing on the credibility of witnesses.

After defendant's witness, J. P. Hodgson, had testified that he sent plaintiff to Doctor Gray in El Paso for examination for the purpose of securing information as to the condition of plaintiff's left eye (Tr. p. 76), and that plaintiff consented to the ex-

amination knowing it was for such purpose (Tr. p. 77), and after Doctor Gray had testified that he made the examination with that understanding, an objection was interposed to the Doctor's testimony (Tr. p. 79). The court then called the plaintiff to the stand to get his version (Tr. p. 83). When plaintiff's statement had been made, the court held the evidence evenly balanced (Tr. p. 85) and excluded the physician's testimony (Tr. p. 87).

Defendant argued that there was nothing involved but weight and credibility; defendant having made out a prima facie case, and plaintiff's statement being rebuttal, the physician's testimony should be admitted and the whole matter go to the jury with proper instructions (Tr. pp. 86-87). Had there been no conflict of the evidence we readily admit the only question before the court would have been one of law —as to the competency of a witness—which upon all of the authorities is for the court. But when the preliminary question was resolved into the single inquiry—whose statement is correct, we submit it was for the jury.

In the case of Hartford Fire Ins. Co. vs. Reynolds, 36 Mich. 502, the question arose on the admissibility of testimony of an attorneay against his client; the evidence was conflicting as to whether the relation of attorney and client existed. The court said:

> "We do not think it improper to leave to the jury the question of the existence of such a relation when disputed. The judge may determine upon the statements of a witness himself whether he is competent or not; but it does not

properly belong to a judge to decide upon the truth of matters which have come out during the examination of witnesses who conflict. And it has been held that on an intricate question of fact the jury may very properly be consulted. —1 Edw. Ph. Ev., 4. We understand this to be correct practice, and in many cases to be the only safe rule for determining such questions. It is laid down very plainly by *Greenleaf*.—1 Gr. E., § § 49, 425."

The preliminary question presented as to the voluntariness of a confession is closely analogous. In United States vs. Oppenheim, 228 Fed. 220, 223, it was said:

"But when it becomes a question of fact whether or not the confession or admission *was* voluntary the same is admissible in evidence, and the jury is to determine the fact and what credit they will give the statement made. Wilson v. United States, 162 U. S. 613, 624, 16 Sup. Ct. 895, 40 L. Ed. 1090; Commonwealth v. Preece, 140 Mass. 276, 5 N. E. 494; People v. Howes, 81 Mich. 396, 45 N. W. 961; Thomas v. State, 84 Ga. 613, 10 S. E. 1016; Hardy v. United States, 3 App. D. C. 35."

The Circuit Court of Appeals for the Sixth Circuit, in passing on the same question in M'Cool vs. United States, 263 Fed. 55, 57, said:

"Whether confessions offered in evidence were voluntary is a question relating to the admissibility of evidence, and therefore a question for the trial court to decide upon the evidence of-

fered; but where there is a conflict of evidence the confession may be submitted to the jury, under instruction to disregard it if 'it finds that it was not voluntary.' Wilson v. United States, 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1091. In this case the court not only found from the evidence that the confessions were voluntary and admitted the same, but also called the attention of the jury to this evidence, and instructed it to give to these confessions such consideration as in its opinion they might be worth."

See to same effect:

Wilson vs. United States, 162 U. S. 613, 40 L. Ed. 1090;

Commonwealth vs. Preece, 140 Mass. 276, 5 N. E. 494;

People vs. Howes, 81 Mich. 396, 45 N. W. 961;

Thomas vs. State, 84 Ga. 613, 10 S. E. 1016.

The rule is the same as to dying declarations. The following language from State vs. Scott, 37 Nev. 412, 142 Pac. 1053, is illustrative:

"It is not the province of the court to determine that a dying declaration has been made, but only that the preliminary evidence warrants the submission of that question to the jury. If the preliminary evidence clearly shows that the proposed declaration was not made in accordance with the rules rendering such a declaration admissible, it is, of course, the duty of the court to decide that the preliminary evidence offered is insufficient to warrant its submission to the

jury. If there is a substantial conflict in the evidence, the court should submit the whole matter to the jury under proper instructions. It is the province of the jury to finally determine from the evidence whether a dying declaration has in fact been made and the weight it is entitled to."

Other cases directly holding that on conflicting evidence the declaration should go to the jury are:

Meno v. State, 117 Md. 435, 83 Atl. 759;

State vs. Davis, 51 Oregon 136, 94 Pac. 44;

McCorquodale v. State, 54 Tex, Cr. R. 344, 98 S. W. 879;

Jackson v. State, 55 Tex. Cr. R. 79, 115 S. W. 263;

Johnson v. State, 218 S. W. 496, (Tex. Not yet officially reported);

People vs. Rulia Singh, 188 Pac. 987, (Cal. Not yet officially reported).

But irrespective of whether the court erred in withholding the preliminary question from the jury, having passed on the question, its conclusion is reviewable on appeal. This court should in such a state of the record determine upon an investigation of the evidence on the point whether there is sufficient foundation to support the ruling, in the same manner that in a proper case the whole record would be searched under the assignmnt, the evidence is insufficient to support the verdict.

It is only ncessary to refer to the decision in *Arizona & N. M. Ry. Co. v. Clark, supra.* On that occas-

sion this court fully reviewed the record on the identical question presented here.

The Supreme Court of the United States has laid down the rule for the review of the trial court's finding on a preliminary question of fact in Gila Valley G. & N. R. Co. v. Hall, 232 U. S. 102, 58 L. Ed. 521, saying that such a finding is not subject to be reversed on appeal or error *if it be fairly supported by the evidence.* (Italics ours).

The scope of review is well stated in State v. Zorn, 202 Mo. 12, 100 S. W. 591, where the question arose on the excluding of a dying declaration:

> "Upon this appeal, it is clearly the duty of this court to review the action of the trial court upon the subject of dying declarations, their admissibility, etc., and the very first question which confronts the court upon this appeal is as to the sufficiency of the basis of foundation laid upon the preliminary inquiry to authorize their admission in evidence. In reviewing the testimony which constitutes the basis for the admission of the dying declarations in this cause, this court must consider the entire testimony."

On the question of review see also:

Commonwealth v. Johnson, 158 Ky. 579;
Gardner v. State, 55 Fla. 25, 45 So. 1028;
State v. McComer, 79 S. C. 63, 60 S. E. 237;
Malone v. State, 72 Fla. 28, 72 So. 415;
State v. Marshall, 98 S. E. 130, (S. C. Not yet officially reported).

We do not think it can be said that the finding that the relation of physician and patient existed between

defendant's witness, Doctor Gray, and the plaintiff is "fairly supported by the evidence."

Turning to the record we find defendant's witness, J. P. Hodgson, stated that plaintiff came to see him at his office about the supposed injury (Tr. p. 75), around the 25th of February, 1919 (Tr. p. 76), which was about a month ofter the date ascribed to the injury. He saw the plaintiff seven or eight times in the course of two months and a half (Tr. p. 76). Plaintiff had been under treatment by Doctor Rice and Doctor Blatherwick, both company physicians (Tr. p. 76).

For convenience we quote the testimony of the manager of the defendant company directly on this point:

> "He afterwards returned to Morenci. (After Phoenix trip). He came into my office and we had a discussion, talked the matter over, and I told him I was willing to send him to any specialist or specialists for a careful examination, if he cared to go.
>
> Q. What was the purpose of these different examinations to be made?
>
> A. So as to be absolutely sure from those specialists that he had really received an injury that had injured his eye, I would settle with him."
>
> Q. You had in mind getting information?
>
> A. Yes, sir.
>
> Q. To act upon? A. Yes, sir.
>
> Q. The plaintiff consented to that?
>
> A. Yes, sir.

Q. What specialist did you conclude to send him to?

A. Dr. Detweiler, and I asked in a letter to Doctor Detweiler to also get another specialist and make a report of the condition, but not treat him at all.

Q. The plaintiff understood, and was assured that that was what you wanted, this information?

A. Yes, sir.

Q. Did the plaintiff go then on his trip to El Paso? A. Yes, sir.

Q. You afterwards received a report upon him?

A. I did.

Q. Now, who arranged with the doctors themselves to make the examination, and who paid them for making it?

A. I arranged by correspondence with the doctors, and we paid the—the company paid the expenses both of Mr. Guerrero's trip to and fro, and the doctors' expenses, too.

Q. You made the arrangement on behalf of the company? A. Yes, sir.

Q. And received the information that they furnished you? A. Yes, sir."

Plaintiff's counsel did not cross examine this witness. The fact is significant.

Doctor Gray corroborated the witness as to the fact of the examination, that plaintiff was sent to him by the defendant company, and the defendant company paid for the examination (Tr. p. 78-79).

On direct examination plaintiff testified:

"The doctor boss foreman sent me to Phoenix. They gave me a letter to take to the doctor. I found the doctor at Phoenix. That doctor only examined my eyesight, that is all (Tr. p. 43-44). After they had me there at Morenci, there in the hospital twenty-five days and treated me twenty-five days, they sent me—the boss doctor there at Morenci sent me to El Paso again to another doctor in El Paso (Tr. p. 44). He also examined me and that is all he done to me (Tr. p. 44). They did not give me any letters; they just sent me back to Morenci. I went back to Morenci. They did not treat me. I used to go over to the doctor at Morenci and put some drops in my eye; that is all he did. He didn't give me any treatment." (Tr. P. 44).

On cross examination plaintiff stated "This Phoenix doctor did not treat me. He only put some drops and examined my eye and that is all he done to me." (Tr. p. 49-50).

In speaking of the El Paso examination he said "Only one doctor examined me. He examined me two times." (Tr. p. 51).

Plaintiff was then asked:

"Q. Are you willing to submit yourself to an examination by physicians to be appointed by this Court to examine your eye and report to the Court and the Jury the true condition of your eyesight at this time?

A. He says, "I have been examined; what more examination do you want?"

Q. Are you willing to submit to the kind of examination I mention?

A. He says, "I have been suffering; no sir; I have been suffering so long, what is the use of having that examination?"

Q. Then you don't want to be examined any more? A. No, sir."

The same question was put to plaintiff's counsel. Mr. Kearney replied "We have no objection to submit." (Tr. p. 52). Mr. Dunseath said "If this man is not suffering from an injury, we want to know it." (Tr. p. 52).

On cross examination plaintiff testified that the same doctor sent him to El Paso that sent him to Phoenix (Tr. p. 50). He was asked:

"Do you know Captain Hodgson, the manager of the defendant company at Morenci?"

A. He says, "they have a captain and also another one and I don't know which one of the captains it was."

(Tr. p. 50).

He was again asked and said he did not know Mr. Hodgson.

When the Court called plaintiff to the stand, plaintiff said he understood he was being sent to El Paso to benefit his eye, that he was to receive treatment for his eye (Tr. p. 83). However, he also stated, "They did nothing but examine me." (Tr. p. 83). He was asked by the Court what conversation he had with Mr. Hodgson about the matter. He replied, "Nothing." In his next answer he admitted he had requested a settlement of him. He stated a second

time that Mr. Hodgson had told him nothing. The question was reframed but he did not seem to understand it. The interpreter repeated it, his response was "He only examined my eye, but he never told me anything." It was apparent the plaintiff did not comprehend. The Court asked the question for the fifth time (Tr. p. 85). Plaintiff replied, "He didn't tell me nothing." The Court ruled, excluding the evidence.

It is clear the trial court regarded what the patient said as tipping the scales or, rather, balancing them, to be exact. The question was wholly one of credibility. The true test is by no means what plaintiff said, but what the fact was in view of all the evidence before the Court. What plaintiff said was a single fact to be weighed with all other relevant evidence. It was not the final fact.

On the one side, the Court had the direct unequivocal testimony of the defendant's manager (Tr. p. 77) and plaintiff's failure to question by cross examination his statement as to plaintiff's consent (Tr. p. 78); plaintiff's admission that he was sent to El Paso with a letter from the defendant company to the doctor (Tr. p. 50), that he was examined, that he was not treated (Tr. p. 44); plaintiff's flat refusal in court to submit to an examination of his eye (Tr. p. 52); his counsel's statement that they wanted to know if he were not suffering from an injury (Tr. p. 52); the failure of plaintiff's doctor to make any attempt to standardize plaintiff's vision because he was not requested by plaintiff or his attorneys (Tr. p. 56, p. 61), though the action was for nothing but

loss of vision (Tr. p. 10); the fact that the doctors reported to defendant (Tr. p. 77), and the doctors were present at the trial as defendant's witnesses.

On the other side, there is first, plaintiff's denial that he knew Mr. Hodgson (Tr. p. 50), then his admission that he talked to him about settlement (Tr. p. 84), his constant repetition that he was not treated, only examined, his complete switch when recalled to the stand, saying he went to El Paso to benefit his eye (Tr. p. 83); and last, his statement "He didn't tell me nothing." (Tr. p. 85).

The situation is different than it was in the Clark case. There is no bedside confidence; no visit of the physician to the patient at the time of the injury. Plaintiff came many times to defendant's office to talk of his injury. Doctor Gray's examination was made weeks after the date of injury, and plaintiff traveled many miles to see him (Tr. p. 78).

In order for the Court to accept plaintiff's version, it was necessary to discount plaintiff's vital interest in the result, the apparent discrepancies in his statements, the fact that he did not have his vision measured by his own physician, his unwillingness to submit to examination by a physician chosen by the Court, his counsel's comment when the question was put to them, and their failure to cross examine defendant's witness, Mr. Hodgson. It was likewise necessary to ignore the plain statement that plaintiff consented, by Mr. Hodgson, and to discover in the evidence a satisfactory explanation of why the plaintiff would go to El Paso and voluntarily submit to an examination (not treatment) the result of which

he would not know (Tr. p. 44); conduct which we confidentially feel on all the evidence can be accounted for only on the theory that it was done for the purpose of informing the defendant as to the extent of plaintiff's vision.

The Court's ruling cannot be said to be "fairly supported by the evidence."

Whatever may be this court's conclusion on a review of the evidence, the exclusion of the physician's testimony after holding the evidence on the preliminary question evenly balanced, was the clearest error. The court said, "Well, the evidence in the matter being evenly balanced; I feel that I ought to sustain the objection." This was no casual expression or comment in passing; it was the deliberate and formal ruling of the court after hearing both parties and defendant's case was virtually wiped out by it. The evidence should have been admitted when it was not shown by a preponderance of evidence that the relation of physician and patient existed. A discussion of cases is unnecessary, the law is that the party asserting the privilege has the burden of proof.

Shuttlefield vs. Neil, 163 Iowa 470, 145 N. W. 1;

Booren vs. Mc Williams, 26 N. D. 558, 145 N. W. 410;

Sharon vs. Sharon, 79 Cal. 633, 22 Pac. 26, 131;

Bowles vs. Kansas City, 51 Mo. App. 416;

Henry vs. New York, L. E. & W. R. Co., 32 N. Y. St. Rep. 16, 57 Hun. 76, 10 N. Y. Supp.508;

Earl vs. Grout, 46 Vt. 113;

Phelps, et al. vs. Root, 78 Vt. 493, 63 A. 941;

Stoddard vs. Kendall, 140 Iowa 688, 119 No. W. 138;

People vs. Austin, 199 N. Y. 446, 93 N. E. 57;

Chicago, I. & L. Ry Co. vs. Gorman, 47 Ind. App. 432, 94 N. E. 730;

People vs. Schuyler, 106 N. Y. 304, 12 N. E.. 783;

Griffith vs. Metropolitan Ry. Co., 171 N. Y. 106, 63 N. E. 808;

Edington vs. Aetna Life Ins. Co., 77 N. Y. 564, (32 Sickels);

Moyers vs. Fogarty, 140 Iowa 701, 119 N. W. 159;

In re. Niday, 15 Idaho 559, 98 Pac. 845;

IV *Wigmore on Evidence,* § 2381.

IV.

The Court erred in holding the followin questions privileged:

What part of the examination did you conduct, and what part did Doctor Detweiler conduct?

Did you and Doctor Detweiler, or either of you, on this occasion, make a test of the plaintiff to ascertain whether or not he really was blind in his left eye?

Did you and Doctor Detweiler, or either of you, on that occasion apply the scientific tests for the purpose of ascertaining whether or not the plaintiff's left eye was normal or abnormal?

And on the same occasion, did you also make an examination of the plaintiff's right eye?

As a result of that whole examination made by yourself and Doctor Detweiler, did you reach a conclusion as to the condition of the plaintiff's eyes?

Under this head we have combined the questions raised by specifications of error VII, VIII, IX, X and XI, because the same argument is to be advanced in support of all. The briefest consideration will demonstrate that each of these questions was preliminary and that we were entitled to an answer to each of them, yes or no in each case.

Questions of this nature have invariably been held proper.

Missouri Pac. Ry Co. vs. Castle, 172 Fed. 841, (8th Circuit). Where the inquiry was as to how patient lost his leg.

Higgs vs. Bigelow, 39 S. D. 359, 164 N. W. 89. Question as to value of services of nurse.

Haughton vs. Aetna Life Ins. Co., 165 Ind. 32, 73 N. E. 592. Physician testified as to his employment.

Nelson vs. Nederland Life Ins. Co., 110 Iowa 600, 81 N. W. 807. Physician testified he was consulted and prescribed.

Price vs. Standard Life & Acc. Co., 90 Minn. 264, 95 N. W. 1118. Physician testified to number of visits.

Deutschman vs. Third Avenue Ry. Co., 78 App. Div. 503, 84 N. Y. S. 887. Physician testified to place and length of treatment.

Becker vs. Metropolitan Life Ins. Co., 99 App. Div. 5, 90 N. Y. S. 1007. Physician testified to

length of illness of patient, number and dates of visits.

Chadwick vs. Beneficial Life Ins. Co., 181 Pac. 448, (Utah. Not yet officially reported). Physician testified patient had consulted him.

Dovich vs. Chief Con. Mining Co., 174 Pac. 627, (Utah. Not yet officially reported). Physician testified length of time patient was under anesthetic.

And on appeal or error it will be concluded that the answer solicited would have been favorable to the party propounding the question. In the case of *Buckstaff vs. Russell & Co.,* 151 U. S. 627, 38 L. Ed. 292, Mr. Justice Harlan said:

> "If the question is in proper form and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the court, in its discretion, or on motion, may require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer. But if that be not done, the rejection of the answer will be deemed error, or not, according as the question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded."

It was error to exclude the answers to these questions. A previous ruling of the court had excluded all of the physician's testimony within the privilege. Under the circumstances, the importance of the de-

fendant showing the jury; that Doctor Gray made a test of the plaintiff to ascertain whether or not he really was blind in his left eye; that Doctor Gray on that occasion applied scientific tests to determine whether or not plaintiff's left eye was normal or abnormal; that Doctor Gray also examined plaintiff's right eye, what part of the examination was made by Doctor Gray and what part by Doctor Detweiler; and as a result of the whole examination, whether Doctor Gray and Doctor Detweiler reached a conclusion as to the condition of plaintiff's eyes, will be fully appreciated. These answers were all that was left of our defense; they were vital and that their exclusion was prejudicial does not call for argument.

CONCLUSION

Plaintiff's claim is that he has been blind in his left eye from the date of the accident (Tr. p. 54). As was stated at the outset, our position is that plaintiff is an impostor. Plaintiff took shelter under the privilege and we did not prove that he was. The court appointed an impartial physician to examine his eyes, but the physician could not state what his vision was because plaintiff would not answer questions or otherwise cooperate (Tr. p. 105, p. 109).

That the court miscontrued and misapplied the statute, thus erroneously excluding our proof we think is clear. Our defense did not go to the jury. If there is error, it is prejudicial.

The judgment should be reversed.

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